

I. INTRODUCTION

1. It is clear that without programming consumers will not invest in DTV receivers and equipment. However, it is not a given that they will if such programming is available, especially not if they perceive the DTV transition to be a land grab that will cost them in the future. There is clear precedent that consumers have rejected such in the failure of DIVX in the early nineties. I well remember considering a DIVX player at the time I was thinking of getting a DVD capable player and thinking that I would never encourage a technology that would eventually have the capability to force me to pay for every view of media that I had already paid for. Consumers really do want to make time shift copies and really do want to be able to skip over content they are not interested in seeing, since the whole point of making the copy was to have better use of their time. Already, I know people who will not rent a DVD and rent only video tapes since they have been burned by the programming on the DVD refusing to let them continue from an arbitrary stopping point (such as occurs when you have to feed the kids dinner) and forcing them to watch the DVD from the beginning. Any DTV receiver that does not allow copies and any video recorder that does not allow repositioning will be rejected by enough consumers to risk widespread acceptance of DTV.

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II. THE BROADCAST FLAG

3. It is not clear that producers will actually refuse to allow content to be digitally broadcast without copy protection. Clearly, they have made such a threat. Clearly also, there is content that would be created and transmitted with or without copy protection, as analog TV and the clear channels on HSD demonstrate. Also clear is that if the law of the land was that TV broadcasts had to be digital with no more said, some content producers would emerge to provide content regardless of the availability of copy protection. I doubt the viability of over the air TV would be affected by such a decision.

4. As indicated above I suspect that the existence of copy protection is liable to discourage rather than encourage acceptance of DTV by the consumer.

5. I do not think DTV transmitters should have any mandate with regard to the ATSC flag except that if they do choose to use it it must have certain forms.

6. Rather than mandating that consumer electronics devices recognize and give effect to the ATSC flag, the Commission should mandate that a method of making copies of indefinite life be supported on all DTV broadcast receivers. This method should record the data immediately after demodulation and give no regard to the presence of the ATSC flag. The ATSC flag should only control access to information after decryption. Just think of the security implications of having a broadcast medium that cannot be recorded, or is extremely rarely recorded! No post facto analysis of a broadcast can be done as copies would not be available. I can think of at least three scenarios such a regime would enable - I am sure the FBI and the DoD would be able to

think of other situations.

A kidnapper attempting to convince a relative. Detailed and persuasive videos could be sent, with relatively no risk of analysis. Today an attempt to communicate in such a way would be greeted with a video recorder and an analysis of the background of the recording.

A spy could transmit detailed information to an accomplice, with relatively no risk of detection or analysis of the information lost. There is no longer much need to hide the fact that a transmission occurred, or even to encrypt it. By the time government forces come in with equipment to bypass the copy protection, the transmission ceases. Today, nobody would even try this - the risk that an open broadcast would be recorded and analyzed is much too high.

A terrorist could communicate with the public and associates directly and be reasonably assured that the transmission would not be analyzed or the associates found. The public part of the transmission would be remembered, but hidden within it could be communication to accomplices for further action. Even if the fact that something was hidden was detected, no analysis would be possible. This is probably the most likely and worrisome, public embarrassment of the relevant authorities and demonstration of their ineptitude is something a terrorist would love to accomplish.

I think the DMCA had it exactly right. It should always be possible to make copies for legitimate purposes. What should be restricted is access for commercial purposes.

7. The appropriate entity should certainly not be the movie studios or anything controlled by them. This would make innovation and investment in such technology an extremely political and dicey proposition. I would suggest the IETF, monitored by the FCC.

8. As long as the copy protection mechanisms do not report back any information about the consumer there should be no privacy concerns. However, piracy detection mechanisms inherently report traceable information (otherwise there would be no point to doing it!) and would violate a consumer's privacy interests. Specifically such mechanisms would enable anybody who had the information to determine who viewed what content.

Anybody wanting to make a public comment about a broadcast needs to make a copy to establish what was in the broadcast. This need not be the decrypted version, only the version immediately after demodulation. Thus I think we have another reason why the commission should require that all DTV receivers be able to supply the data immediately after demodulation. Given that many such broadcasts will be lengthy items, effective exercise of ones First Amendment rights would require that it be possible to make excerpts of, or construct effective pointers to, a particular portion of the broadcast regardless of the ATSC flag. The latter means that it should always be possible to skip around within a recorded copy.

9. "The BPDG Final Report asserts that a broadcast flag system would not interfere with consumers• ability to make secure copies of DTV

content for their personal use, either on personal video recorders or removable media.¹⁰ Similarly, the BPDG Final Report states that the requirements to protect digital outputs should not interfere with consumers' ability to send DTV content across secure digital networks, such as •home digital network connecting digital set top boxes, digital recorders, digital servers and digital display devices.¹¹ " This should be mandatory.

It should also be mandatory that it be possible to make excerpts and to be able to pick and choose which portions of a copy will be watched.

III. JURISDICTION

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IV. ADMINISTRATIVE MATTERS

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V. ORDERING CLAUSES

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